Supreme Court, U.S.
FILED
MAY 17, 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1699

In The

# Supreme Court of the United States

October Term, 1988

THOMAS P. CULLEN,

*Petitioner,*

vs.

PAINE, WEBBER, JACKSON & CURTIS, INC.
n/k/a PAINEWEBBER INCORPORATED,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals erred in ruling that Thomas P. Cullen ("Cullen") could not oppose the motion of Paine, Webber, Jackson & Curtis, Inc. ("PaineWebber") to Confirm Arbitration Decision because Cullen filed his Opposition and Cross-Motion to Vacate well beyond the three-month time period that is expressly provided by Section 12 of the Federal Arbitration Act.

2. Whether the Eleventh Circuit Court of Appeals erred in ruling that Cullen's pursuit of settlement negotiations beyond the three-month time period did not operate as a "due diligence" exception to Section 12 because Cullen never demonstrated that he was precluded from filing a motion to vacate within the three-month time period.

## PARTIES

Thomas P. Cullen

Paine, Webber, Jackson & Curtis, Inc.

PaineWebber Incorporated

PaineWebber Group, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

PARTIES ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... iv

OPINIONS AND JUDGMENTS BELOW ..... 1

JURISDICTION ..... 2

STATUTES INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

SUMMARY OF THE ARGUMENT ..... 5

ARGUMENT ..... 6

A. The Federal Courts of Appeals Have Uniformly Held That The Expiration Of The Three-Month Period Operates As An Absolute Bar ..... 7

B. No Federal Court of Appeals Has Adopted A "Due Diligence" Exception To A Timely Motion To Vacate Under Section 12 ..... 11

CONCLUSION ..... 12

TABLE OF AUTHORITIES

Page

CASES

*American Postal Workers Union, AFL-CIO v. United States Postal Service*, 823 F.2d 466 (11th Cir. 1987) ..... 8

*Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) ..... 7

*Brotherhood of Teamsters & Auto Truck Drivers, Local Number 70 of Alameda County v. Celotex Corp.*, 708 F.2d 488 (9th Cir. 1983) ..... 8

*Chauffeurs, Teamsters, Warehousemen & Helpers, Local Union Number 135 v. Jefferson Trucking Co.*, 628 F.2d 1023 (7th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981) ..... 8, 10

*Detroit Edison Co. v. National Labor Relations Board*, 440 U.S. 301 (1979) ..... 7

*Florasynth, Inc. v. Pickholz*, 750 F.2d 171 (2d Cir. 1984) ..... 8, 9, 10

*International Brotherhood of Electrical Workers, Local Union Number 969 v. Babcock & Wilcox*, 826 F.2d 962 (10th Cir. 1987) ..... 8

*Marks v. United States*, 430 U.S. 188 (1977) ..... 7, 10

*Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) ..... 12

*Occidental Chemical Corp. v. International Chemical Workers Union*, 853 F.2d 1310 (6th Cir. 1988) ..... 8, 9

*Paul Allison, Inc. v. Minikin Storage of Omaha, Inc.*, 452 F. Supp. 573 (D. Neb. 1978) ..... 10

*Piccolo v. Dain, Kalman & Quail, Inc.*, 641 F.2d 598 (8th Cir. 1981) ..... 8, 11

TABLE OF AUTHORITIES – Continued

Page

*Riko Enterprises, Inc. v. Seattle Supersonics Corp.*, 357 F. Supp. 521 (S.D.N.Y. 1973) ..... 10

*Service Employees International Union, Local Number 36, AFL-CIO v. Office Center Services, Inc.*, 670 F.2d 404 (3d Cir. 1982) ..... 8, 9, 10

*Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) ..... 12

*Stewart Organization, Inc. v. Ricoh Corp.*, 108 S.Ct. 2239 (1988) ..... 12

*Taylor v. Nelson*, 788 F.2d 220 (4th Cir. 1986) ..... 8, 11

*The Hartbridge*, 57 F.2d 672 (2d Cir. 1932) ..... 10

*Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) ..... 7

STATUTES

9 U.S.C. § 9 ..... 2, 4

9 U.S.C. § 10 ..... 2, 4

9 U.S.C. § 12 ..... *passim*

TREATISE

M. Domke, Commercial Arbitration § 35:01 (1984) .... 10

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## OPINIONS AND JUDGMENTS BELOW

The opinion of the Eleventh Circuit Court of Appeals (P.A.-16-22) is reported at 863 F.2d 851. The opinion of the District Court (P.A.-12-15) is unreported but may be obtained at the United States District Court, Northern District of Georgia, Atlanta Division, Civil No. 1:84-cv-502-ODE entered on April 7, 1988.

## JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on January 17, 1989. The Petition for Writ of Certiorari was filed on April 17, 1989. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

9 U.S.C. § 9 in pertinent part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

9 U.S.C. § 10:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –
>
> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 12 in pertinent part:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.

## STATEMENT OF THE CASE

Petitioner Thomas P. Cullen ("Cullen") is a former employee and investment executive of Respondent Paine, Webber, Jackson & Curtis, Inc. ("PaineWebber"). In February, 1984, Cullen initiated this action in the Superior Court of Fulton County, State of Georgia and alleged that PaineWebber had engaged in certain tortious conduct and that a promissory note between them was void (P.A.-17). The suit was subsequently removed to the United States District Court for the Northern District of Georgia, Atlanta Division (the "District Court") and was stayed pending arbitration of all disputes between the parties. (P.A.-2-3; P.A.-10).

On June 23 and 24, 1987, the Parties arbitrated their respective claims before an agreed-upon panel of arbitrators of the New York Stock Exchange, Inc. (P.A.-12). Following the two-day hearing, the Arbitrators issued a written decision on June 24, 1987 awarding PaineWebber $216,932.83. (P.A.-11). PaineWebber filed a timely motion to reopen and to confirm the arbitration decision in the District Court on November 20, 1987 pursuant to Section 9 of the Federal Arbitration Act, 9 U.S.C. § 9. (P.A.-12). On December 9, 1987, over five months after the Arbitrators had issued their award against Cullen, Cullen responded to that motion by serving a cross-motion to vacate pursuant to Section 10 of the Federal Arbitration Act, 9 U.S.C. § 10. (P.A.-12).

In an Order dated April 5, 1988, the District Court denied Cullen's Section 10 motion on the ground that it was time barred by the three-month limitation period of Section 12 of the Federal Arbitration Act, 9 U.S.C. § 12. (P.A.-15). The District Court also rejected Cullen's argument that his failure to move to vacate within the statutory three-month period should be forgiven under what he termed as a "due diligence" exception to Section 12. (P.A.-14-15). Accordingly, the District Court granted PaineWebber's motion to confirm and entered final judgment against Cullen in the amount of $216,932.83. (P.A.-15).

The Eleventh Circuit Court of Appeals affirmed. (P.A.-22). Like the other Courts of Appeals that have addressed the issue, the Eleventh Circuit ruled that the failure of a party to move to vacate an arbitration award within the three-month limitation period of Section 12 precludes him from contending that the award is invalid

even if it is asserted as a defense to a motion to confirm. (P.A.-21). The Eleventh Circuit also was "unpersuaded" by Cullen's "due diligence" argument because he cited no case in which such an exception was the basis for overturning an untimely motion to vacate and, even if it was a recognized exception, Cullen had alleged insufficient facts to show that he was prevented from filing a timely motion to vacate. (P.A.-22). In summary, the Eleventh Circuit found Cullen's arguments to be "meritless" and affirmed the judgment of the District Court. (P.A.-22 n. 5).

## SUMMARY OF THE ARGUMENT

This Court should not grant certiorari because the issues involved have been expressly resolved by Congress in Section 12 of the Federal Arbitration Act, 9 U.S.C. § 12, and uniformly confirmed by all of the Courts of Appeals to address those issues. Section 12 provides an absolute bar to any attempt to vacate an arbitration decision beyond three months from the date that the Arbitrators' decision was filed or delivered. The strict mandate of Section 12 applies to an untimely motion to vacate and late opposition to motions to confirm. Petitioner's failure to meet a clear but generous filing deadline is not the type of matter that should be before this Court.

Moreover, despite Petitioner's arguments to the contrary, there is no "due diligence" exception to Section 12's three-month time period. No Court of Appeals has adopted one, and this Court should not establish such a precedent on behalf of someone who failed to meet a clear deadline established by Congress.

Finally, even if such an exception exists, Petitioner has failed to satisfy it. The few courts which have even considered the remote possibility of a due diligence exception indicate that even if such an exception is proper, it can only be met through a showing of best efforts to file, excusable neglect and absence of prejudice to the opposing party. In the present case, Petitioner has failed to make such a showing. Accordingly, this Court should deny the Petition for Writ of Certiorari.

## ARGUMENT

Petitioner asks this Court to address a question that has received the same answer from all of the Courts of Appeals to have reached it[1] and is expressly mandated by Section 12 of the Federal Arbitration Act, 9 U.S.C. § 12. This is not a case involving an important federal question, implicating far-reaching national concerns which might necessitate consideration by this Court. Rather, this is simply a case where Petitioner failed to meet a clearly

[1] Cullen specifically claims that the decision of the Eleventh Circuit below "is in conflict with another appellate court case . . . ," (P.-3), but does not cite a single case in support of this argument. Similarly, it is absolute sophistry for Cullen to claim that the Eleventh Circuit decision was based on a "changed interpretation" of Section 12 (P. 7, 8) when he has presented no authority from a single Court of Appeals demonstrating an interpretation that was different from that of the Eleventh Circuit.

established and generous filing deadline. Accordingly, further review is unwarranted.[2]

### A. The Federal Courts Of Appeals Have Uniformly Held That The Expiration Of The Three-month Period Operates As An Absolute Bar

Section 12 of the Federal Arbitration Act provides an aggrieved party a strict time limit of three months within which to file a motion to vacate. Section 12 mandates: Notice of a motion to vacate . . . must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12.

Without exception, the federal Courts of Appeals have ruled that the expiration of the three-month period absolutely precludes any attempt to vacate an arbitration

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[2] Significantly, nowhere in the Petition for Writ of Certiorari does Cullen even attempt to argue that the instant case satisfies the character of reasons in favor of granting certiorari as stated in Rule 17.1 of the Rules of this Court. In fact, Petitioner does not even cite one case from this Court in which certiorari was granted under similar circumstances. *See, e.g., Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 336 (1982) (granting certiorari because the undisputed facts disclosed a violation of a statute); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 470 (1982) (granting certiorari because of the unusually broad and novel view adopted by a Court of Appeals); *Detroit Edison Co. v. National Labor Relations Board,* 440 U.S. 301, 304 (1979) (granting certiorari to consider an important question of federal law); *Marks v. United States,* 430 U.S. 188, 189 (1977) (granting certiorari to resolve a conflict in the Circuits).

decision.[3] The three-month statute of limitations of Section 12 also bars a party from opposing a motion to confirm an arbitration award because such opposition is viewed as tantamount to a motion to vacate.[4] The rationale for the three-month rule under Section 12 is the rapid resolution of arbitrated disputes. *See American Postal Workers Union, AFL-CIO v. United States Postal Service*, 823 F.2d 466, 476 (11th Cir. 1987). As the Sixth Circuit Court of Appeals has emphasized,

> [a]n action to vacate an award challenges the underlying *validity* of the arbitration proceeding and award. The policy of quickly resolving disputes subject to arbitration, . . . favors a short limitations period for such challenges. Occasionally, in the implementation process, however, parties to an arbitration may be willing or find it necessary to readjust the terms of the arbitration award before seeking its

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[3] *See, e.g., Occidental Chemical Corp. v. International Chemical Workers Union*, 853 F.2d 1310, 1316, 1317 (6th Cir. 1988); *Taylor v. Nelson*, 788 F.2d 220, 225 (4th Cir. 1986); *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984); *Brotherhood of Teamsters & Auto Truck Drivers, Local Number 70 of Alameda County v. Celotex Corp.*, 708 F.2d 488, 490 (9th Cir. 1983); *Piccolo v. Dain, Kalman & Quail, Inc.*, 641 F.2d 598, 600 (8th Cir. 1981). *See also International Brotherhood of Electrical Workers, Local Union Number 969 v. Babcock & Wilcox*, 826 F.2d 962, 965-66 (10th Cir. 1987); *Service Employees International Union, Local Number 36, AFL-CIO v. Office Center Services, Inc.*, 670 F.2d 404, 412 (3d Cir. 1982); *Chauffeurs, Teamsters, Warehousemen & Helpers, Local Union Number 135 v. Jefferson Trucking Co.*, 628 F.2d 1023, 1025 (7th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981).

[4] *Occidental*, 853 F.2d at 1317; *Babcock & Wilcox*, 826 F.2d at 966; *Taylor*, 788 F.2d at 225; *Florasynth*, 750 F.2d at 175; *Celotex*, 708 F.2d at 490; *Office Center Services*, 670 F.2d at 412.

> confirmation. Recognizing the realities of the marketplace, [the United States Congress] may with good reason have allowed a longer period of time for the confirmation of a concededly valid award without forcing the parties to resort to judicial involvement.

*Occidental Chemical Corp. v. International Chemical Workers Union*, 853 F.2d 1310, 1314 (6th Cir. 1988) (quoting *Service Employees International Union, Local Number 36, AFL-CIO v. Office Center Services, Inc.*, 670 F.2d 404, 412 (3d Cir. 1982)).

In the present case, Cullen did not move to vacate and raise his affirmative defenses to PaineWebber's motion to confirm until well over five months after the Arbitrators issued their award. (P.A.-14).[5] Under the strict mandate of Section 12, and the universal holdings of the Courts of Appeals, Cullen was late in raising his objections and lost any right to move to vacate the arbitration award.[6]

Despite the clear mandate of Section 12 and the uniform decisions by the Circuit Courts of Appeals, Cullen still contends that his motion was timely filed based upon

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[5] Although Section 12 states that the three-month period does not begin to run until the arbitration award is "filed" or "delivered," courts interpret that the three-month time period commences when the arbitrators issue their award. *See, e.g., Florasynth*, 750 F.2d at 177.

[6] Cullen improperly argues that the arbitration award should have been vacated supposedly because "[t]he arbitrators' conduct showed partiality and constituted misconduct which prejudiced Mr. Cullen's rights to a fair arbitration . . . ." (P.-9). The Court is respectfully urged not to consider these arguments because neither the District Court nor the Eleventh Circuit below made any finding of fact or conclusion of law on these points.

two district court opinions, *Riko Enterprises, Inc. v. Seattle Supersonics Corp.*, 357 F. Supp. 521 (S.D.N.Y. 1973) and *Paul Allison, Inc. v. Minikin Storage of Omaha, Inc.*, 452 F. Supp. 573 (D. Neb. 1978). Of course, even if these decisions were persuasive, they do not create a conflict among the Circuit Courts of Appeals which would warrant this Court to consider granting certiorari. *See, e.g., Marks v. United States*, 430 U.S. 188, 189 (1977). Nevertheless, the courts in *Riko* and *Paul Allison* incorrectly arrived at their conclusions because they misconstrued a decision of the Second Circuit Court of Appeals which was essential to their respective holdings, *The Hartbridge*, 57 F.2d 672 (2d Cir. 1932).[7] In fact, the Second Circuit Court of Appeals in *Florasynth* overruled *Riko* and held that a party who fails to move to vacate within the three-month period loses the right to oppose an arbitration decision. 750 F.2d at 174-75. In light of the overwhelming rejection of these two district court decisions and Cullen's lack of compelling authority, Cullen has asserted no grounds whatsoever that should convince the Court to grant certiorari.[8]

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[7] Other courts have also underscored the misinterpretation of *The Hartbridge* by the *Riko* and *Paul Allison* courts. *See, e.g., Office Center Services*, 670 F.2d at 411; *Jefferson Trucking*, 628 F.2d at 1026.

[8] Cullen also cites M. Domke, Commercial Arbitration § 35:01 (1984), in support of his argument that his motion to vacate was timely. Commercial Arbitration, however, is also unpersuasive because it relies only on *Paul Allison* in drawing its conclusion. *See* M. Domke, Commercial Arbitration § 35:01 n. 2.

### B. No Federal Court of Appeals Has Adopted A "Due Diligence" Exception To A Timely Motion To Vacate Under Section 12.

Section 12 of the Federal Arbitration Act does not provide any exception whatsoever to the three-month time limitation. *See* 9 U.S.C. § 12. Yet, Cullen, once again, misinterprets the law and argues that "courts may yet recognize a due diligence exception . . . ." (P.-10) (citing *Taylor*, 788 F.2d at 225). In fact, like the Eleventh Circuit below, the Fourth Circuit Court of Appeals in *Taylor* questioned the existence of an exception to Section 12 because it is "not implicit in the language of the statute, and cannot be described as [a] common-law exception[ ] because there was no common-law analogue to enforcement of an arbitration award." 788 F.2d at 225.

Moreover, like the aggrieved party to the arbitration in *Taylor*, Cullen's actions should not satisfy any such "due diligence" exception. The few courts which have even considered the possibility of a due diligence exception suggest that a due diligence defense will not be successful absent a showing of best efforts to file, excusable neglect and absence of prejudice to the opposing party. *See, e.g., Taylor*, 788 F.2d at 225; *Piccolo*, 641 F.2d at 601. Cullen has not made such a showing. There is no reason why Cullen could not have filed his motion to vacate within the statutory time frame in order to protect his rights in the event that his settlement negotiations fell through. (P.A.-22). Even Cullen does not argue that he could not have filed his motion earlier. Moreover, PaineWebber would have been prejudiced by the delay because it had relied on the fact that the dispute had finally ended. Accordingly, the Eleventh Circuit Court of

Appeals correctly rejected Cullen's unfounded claim that he met a so-called "due diligence" exception. (*Id.*).[9]

## CONCLUSION

For the foregoing reasons, Respondent PaineWebber respectfully requests the Court to deny Cullen's Petition for Writ of Certiorari.

Respectfully submitted,

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[9] Cullen spuriously contends that this Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), will somehow open the "floodgates to dispute resolution through arbitration thereby necessitating guidance on the duties of arbitrators and the various interpretations of the section 12 statute of limitations." (P.-11). As this Court undoubtedly is aware, to follow the path as argued by Cullen would be tantamount to this Court "rewriting" the Federal Arbitration Act and impermissibly invading the province of Congress. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625-26 (1978); *see also Stewart Organization, Inc. v. Ricoh Corp.*, 108 S.Ct. 2239, 2242 (1988).